IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ____ 77-1581

BROWN TRANSPORT CORP.,
Petitioner,

vs.

ATCON, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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CASE CITATIONS

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No. _____

BROWN TRANSPORT CORP.,

Petitioner,

vs.

ATCON, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioner, BROWN TRANSPORT CORP., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of Georgia rendered in the above-captioned case on November 15, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 144 Ga. App. 510, 241 S.E.2d 15, and appears at Appendix A, *infra*, pp. A-2, A-3, A-4. That opinion affirmed the judgment of the Civil Court of Fulton County, which is unreported and appears at Appendix A, *infra*, p. A-1. Petitioner's motion for rehearing in the Court of Appeals of Gerrgia was denied without opinion

and its application for writ of certiorari and motion for reconsideration in the Supreme Court of Georgia were denied without opinion. See Appendix A, pp. A-4, A-5.

JURISDICTION

The opinion of the Court of Appeals of Georgia was entered on November 15, 1977. Petitioner's motion for rehearing in that Court was denied on December 7, 1977. Petitioner then applied to the Supreme Court of Georgia for the writ of certiorari. Petitioner's application was denied on January 25, 1978, and its motion for reconsideration was denied on February 8, 1978. This petition for certiorari was filed less than ninety (90) days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

Petitioner, a common carrier by motor vehicle, billed the consignee of a shipment in interstate commerce for freight charges within seven days of delivery as prescribed by regulations of the Interstate Commerce Commission. After a period of some seven months, during which time Petitioner unsuccessfully attempted to collect the freight charges from the consignee, Petitioner looked to the consignor for payment of the freight charges. The courts below have held that the Petitioner's failure to bill the consignor within seven days of delivery, as prescribed by the regulations of the Interstate Commerce Commission, precluded it from later collecting the freight charges from the consignor.

The questions presented are:

(1) Whether the regulations of the Interstate Commerce Commission contained in 49 C.F.R. §1322 require a common carrier by motor vehicle to bill both the consignee and consignor of a shipment within seven days of delivery when the consignee has agreed in the bill of lading contract to pay the freight charges.

(2) Whether a common carrier by motor vehicle can be precluded from collecting charges made pursuant to tariffs filed with the Interstate Commerce Commission solely by virtue of its failure to comply with a regulation of that Commission.

STATUTES AND REGULATIONS INVOLVED

This case involves §§217 and 223 of Part II of the Interstate Commerce Act, 49 U.S.C. §§317 and 323, and the regulations of the Interstate Commerce Commission set forth at 49 C.F.R. §1322. These are reprinted in pertinent part in Appendix B, *infra*.

STATEMENT OF CASE

In October of 1974, Petitioner, BROWN TRANSPORT CORP. (hereinafter Brown), delivered certain freight from ATCON, INC. (hereinafter Atcon) in Dalton, Georgia, as consignor, to Idaho Shippers Association (hereinafter Shippers), as consignee in Salt Lake City, Utah (Tr. 2)[1]. Brown accepted the shipments for delivery with charges incurred to be paid by Shippers as consignee (Tr. 6).

The shipments were made pursuant to bills of lading prepared by Atcon which incorporated Section 7 of the

[1] "Tr." refers to the transcript of evidence as certified to the Court of Appeals of Georgia by the Civil Court of Fulton County. "R" refers to the record as certified to the Court of Appeals of Georgia by the Civil Court of Fulton County.

Uniform Bill of Lading (Tr. 5, 25, 28, 31, 33). That section provides, in pertinent part:

> "Section 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, but, except in those instances where it may lawfully be authorized to do so, no carrier shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges . . ." (R. 9)

Atcon, as consignor, did not sign the stipulation referred to in Section 7 of the bill of lading (Tr. 6), and therefore remained liable for the freight and all other lawful charges.

Brown billed Shippers on open account for the freight charges (Tr. 6). Brown then pursued collection of the amount due, both through its own efforts and through an outside collection agency, for a period of approximately seven months (Tr. 6, 7). Finally, Shippers, the consignee, went defunct, and Brown proceeded against Atcon for payment of the freight charges (R. 7).

Accordingly, Brown brought suit against Atcon in the Civil Court of Fulton County, Georgia (R. 3, 4). At the trial of the case, counsel for Atcon made an oral motion for directed verdict, contending that Brown was precluded from collecting the freight charges from it by its failure

to bill Atcon within seven days of delivery, as required by 49 C.F.R. §1322 (Tr. 10, 11). This motion was granted by the trial judge, and Brown subsequently appealed to the Court of Appeals of Georgia.

The federal question in this case concerns the interpretation of and the effect to be given to the regulations of the Interstate Commerce Commission contained at 49 C.F.R. §1322. The federal question was first raised on the motion for directed verdict when the trial judge held that the regulation required Brown to bill Atcon within seven days of delivery and, by its failure to do so, Brown was precluded from later collecting the freight charges from Atcon (R. 61). See Judgment, *infra* p. A-6.

In its appeal to the Court of Appeals of Georgia, Brown raised this question in its fifth Enumeration of Error, which complained as follows:

> "5.
>
> By its Judgment dated June 7, 1977, the Court erred in its interpretation and application of the Seven Day Rule, 49 C.F.R. Section 1322, and the principle of estoppel."

The Court of Appeals of Georgia affirmed the trial court, and held that judgment for the defendant was proper where the defendant had not been billed within seven days of delivery pursuant to 49 C.F.R §1322.

Following its motion for rehearing to the Court of Appeals of Georgia, Brown applied to the Supreme Court of Georgia for a writ of certiorari. In its application Brown, in enumerating the errors in the decision of the Court of Appeals, raised the federal question as follows:

> "(a) The decision of the Court misinterprets 49 C.F.R. §1322 in that this is a remedy and procedure

for the I.C.C. to regulate with and is not a defense which the defendant can use in refusing to pay the lawful charges."

This application for the writ of certiorari was denied on January 25, 1978, and the motion for reconsideration subsequently brought by Brown was denied on February 8, 1978.

REASONS FOR GRANTING WRIT

In its decision, the Court of Appeals of Georgia has held that, by reason of its failure to bill Atcon, the consignor of the shipment, within seven days of delivery, Brown, the carrier, is precluded from later collecting the freight charges from Atcon. Brown has been held to be estoppel from collecting the amount due from Atcon even though Brown had billed Shippers, the consignee of the shipment, within seven days of delivery, and proceeded against Atcon only when it was unable to collect the charges from Shippers. The bill of lading contract specified that Shippers, as consignee, was to pay the freight charges, but Atcon, as consignor, remained liable for the payment of those charges. The decision of the Court of Appeals of Georgia is grounded solely in Brown's failure to bill the consignor within seven days, and it does not take into account any other actions by Brown which might give rise to an equitable estoppel.

Brown, the carrier, submits that the prior decisions in this case are not in accord with the purpose of the Interstate Commerce Act and applicable decisions of this Court. Therefore, for the reasons discussed below, this Court should review the decision of the Court of Appeals of Georgia in this case by the writ of certiorari.

I. REGULATIONS OF THE INTERSTATE COMMERCE COMMISSION DO NOT REQUIRE "DOUBLE BILLING".

The regulations involved in this case were issued pursuant to §223 of the Interstate Commerce Act, 49 U.S.C. §323. That section prohibits a common carrier by motor vehicle from delivering freight transported in interstate commerce until all tariff rates and charges have been paid, except under rules and regulations of the Interstate Commerce Commission. The Commission is authorized to prescribe rules and regulations to govern the settlement of such rates and charges while preventing "unjust discrimination or undue preference or prejudice," 49 U.S.C. §323. It is clear that the prevention of discrimination in the credit treatment afforded shippers by carriers is the purpose of this statute, and the regulations issued thereunder. *See e.g. United States v. General Expressways, Inc.*, 270 F.Supp. 115 (D.C. Colo. 1967).

The Interstate Commerce Commission, pursuant to 49 U.S.C. §323, has adopted a regulation which requires that freight bills for all transportation charges be presented to the "shipper" within seven calendar days following delivery of the freight, 49 C.F.R. §1322.3. A "shipper" is defined in 49 C.F.R. §1322.1 as the person who undertakes to pay the tariff charges. Brown submits that this regulation only requires that one of the parties to the shipment be billed, that being the party who has agreed to pay the freight charges. The identify of that party must be determined with reference to the bill of lading, which constitutes the contract between the parties.

The Interstate Commerce Act has left the parties to a shipment free to contract among themselves as to who is to pay the freight charges, subject to the rules and regu-

lations which prevent unjust discrimination or undue preferences. The decisions below in these cases have not looked to the bill of lading contract to see which party is required to be billed by 49 C.F.R. §1323.3. Instead, they have held that, as a matter of law, the carrier is required to bill the consignor of the shipment within seven days of delivery in order to preserve its right to later collect from the consignor, notwithstanding the fact that the consignee has agreed, by the terms of the bill of lading, to pay the freight charges. This holding bears no relation to the purpose of the Interstate Commerce Act, which is the elimination of unjust discrimination or undue preferences.

In order to avoid the estoppel effect of the decisions below, a carrier will have to bill both the consignee and the consignor within seven days of delivery. This does nothing to eliminate undue preferences, but creates a situation where the carrier has two bills outstanding, both for the full amount due. This result, and the obvious confusion which it would generate, cannot be required by the Regulations of the Interstate Commerce Commission, and the decisions below should be reviewed by this Court.

II. REGULATIONS OF THE INTERSTATE COMMERCE COMMISSION CANNOT BE APPLIED TO PRECLUDE THE COLLECTION OF FREIGHT CHARGES ESTABLISHED BY TARIFFS FILED PURSUANT TO THE INTERSTATE COMMERCE ACT.

The freight charges which Brown is attempting to collect in this action were established pursuant to the tariffs lawfully published and on file with the Interstate

Commerce Commission. The publication of such tariffs is required by §217 of the Interstate Commerce Act, 49 U.S.C. §317. The Act forbids a common carrier by motor vehicle to charge, demand, collect or receive a greater or less or different compensation than that specified in the tariffs. Yet, the Court of Appeals of Georgia has held that, by its failure to comply with a regulation enacted pursuant to another section of the Act, the carrier is precluded from collecting the tariff charges, as it is required to do by this section. This Court has consistently held that, even though a carrier has initially undercharged for the freight charges, the full amount of the charge as prescribed by the tariff must be paid, and the party responsible for paying the charges cannot avoid a subsequent action for payment of the undercharge. *E.g.*, *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919); *New York Central & Hudson River Railroad Company v. York & Whitney Company*, 256 U.S. 406, 41 S.Ct. 509, 65 L.Ed. 1016 (1920). The same result should apply here. The carrier did not undercharge the consignor, it simply did not bill it until it had exhausted its collection efforts against the consignee. The consignor should not be allowed to avoid the payment of the lawful tariff charges by this delay in billing, even though the delay may be a technical violation of a regulation of the Interstate Commerce Commission.

The previous decisions in this case have applied the doctrine of estoppel to preclude the carrier from proceeding against the consignor for the lawful tariff charges. The tariff rates were established pursuant to Part II of the Interstate Commerce Act, which was designed to regulate transportation by motor carriers in the public

interest, *see* 49 Stat. 543, §202; *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544 (1943). The doctrine of estoppel cannot be applied to defeat the requirements of a statute which has been enacted in the public interest. This principle has been applied by this Court in other cases involving the collection of interstate freight rates, *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919); *Louisville & Nashville Railroad Company v. Central Iron & Coal Company*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924); as well as in cases involving the application of patent laws, *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 66 S.Ct. 101, 90 L.Ed. 47 (1945); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 63 S.Ct. 172, 87 L.Ed. 165 (1942); and in cases of federal statutes effecting national banks, *Awotin v. Atlas Exchange Nat. Bank*, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1934); *Deitrick v. Greany*, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 (1939). The same rule should apply here, and the carrier cannot be precluded from complying with 49 U.S.C. §323.

The doctrine of estoppel has been applied by other federal courts where there has been conduct of the carrier beyond a mere failure to bill both parties to the shipment which would give rise to an equitable estoppel. *See, Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7 Th. Cir. 1971); *Mason & Dixon Lines, Inc. v. Crossville Rubber Products, Inc.*, 414 F.Supp. 166 (D.C.Tenn. 1976). However, there are no such other factors present here, and Brown submits that a mere failure to bill the consignor for the freight charges within seven days of delivery will not estop it from later collecting those charges from the consignor. This rule has been recognized and adopted

by other state courts, *East Texas Motor Freight Lines v. Franklin County Distilling Co.*, 184 S. W. 2d 505 (C.C.A.Tex. 1944); *AAA Trucking Corp. v. Spherex, Inc.*, 110 N.H. 472, 272 A. 2d 594 (1970), and Brown contends that it should be adopted in this case.

CONCLUSION

The decision of the Court of Appeals of Georgia creates a requirement that a carrier must bill both the consignee and the consignor of a shipment within seven days of delivery in order to fully protect its right to collect the lawful tariff charges for the shipment. As stated above, this requirement, and the decision of the Court of Appeals of Georgia, is not in accordance with the requirements and purpose of the Interstate Commerce Act, nor is it in accordance with applicable decisions of this Court. Therefore, the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HARRY W. BASSLER, Counsel for BROWN TRANSPORT CORP., Petitioner herein, and a member of the Bar of the Supreme Court of The United States, hereby certify that on the 4th day of May, 1978, I served three copies of the foregoing Petition for Writ of Certiorari on ATCON, INC., Respondent herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at their post office address, to wit:

D. LAKE RUMSEY, JR., ESQUIRE
JOHN R. LOWERY, ESQUIRE
KUTOK, ROCK & HUIE
1200 Standard Federal Building
Atlanta, Georgia 30303

I further certify that all parties required to be served have been served.

HARRY W. BASSLER
Counsel for Petitioner,
Brown Transport Corp.

APPENDIX A: OPINIONS BELOW

I. JUDGMENT OF THE CIVIL COURT OF FULTON COUNTY, GEORGIA IN THE CIVIL COURT OF FULTON COUNTY STATE OF GEORGIA

BROWN TRANSPORTATION CORPORATION, OPERATOR OF HARPER MOTOR LINES, INC., *Plaintiff,* VS. ATCON, INC. A GEORGIA CORPORATION, *Defendant.*	CIVIL ACTION FILE NO. 580832

JUDGMENT

This action having come on for trial before the Court, Honorable Kermit Bradford, Judge, presiding, and evidence having been submitted and the issues having been tried, and it appearing that Plaintiff, in violation of 49 C.F.R. §1322, failed to bill the Defendant shipper, as required, within seven (7) days of delivery, and in fact did not bill Defendant shipper for at least seven (7) months after said delivery.

It is Ordered and Adjudged that the Plaintiff take nothing, and that the action be dismissed on the merits, and that the Defendant recover of the Plaintiff his cost of action.

Dated at Atlanta, Georgia, this 7th day of June, 1977.

/s/ BRADFORD
Judge, Superior Ct.

II. OPINION OF THE COURT OF APPEALS OF GEORGIA

COURT OF APPEALS
OF THE STATE OF GEORGIA

October Call

AFFIRMED Nov. 15, 1977

54694. BROWN TRANSPORTATION CORPORATION etc. v. ATCON, INC. 21-179

McMURRAY, Judge.

Atcon, Inc., a Georgia corporation, delivered four separate shipments of carpeting materials to Brown Transportation Corporation, operator of Harper Motor Lines, Inc., to be shipped collect to the consignee, Idaho Shippers Association, Salt Lake City, Utah. The carrier delivered the goods without receiving payment for the freight charges, even though shipped collect. The carrier subsequently billed the consignee on open account but failed to give the shipper any notice whatsoever of this conduct. The carrier failed to collect the freight charges from the consignee. Some seven months later, after extension of credit to the consignee, the carrier realized that the consignee was in serious financial difficulty and the carrier presented the freight bill to the shipper and demanded payment. When Atcon, Inc. refused to pay Brown Transportation Corporation, operator of Harper Motor Lines, Inc., the carrier, sued Atcon, Inc., to recover the

shipping charges invoking Section 7 of the bill of lading contract. The defendant answered, denying any indebtedness was due and in addition to pleading the defense of failure to state a claim it also raised the affirmative defenses of estoppel, fraud, laches and waiver.

After discovery the case came on for trial before the court without a jury. The court held that the plaintiff was in violation of 49 CFR, §1322 in that it failed to bill the defendant shipper as required within seven days of delivery and failed to bill defendant shipper for at least seven months after said discovery. Hence, the plaintiff was entitled to nothing. Plaintiff appeals. *Held:*

1. Generally, the carrier may collect the shipping charges from the shipper or consignee absent a special contract under which the carrier agrees to relieve one or the other. *Aero Mayflower Transit Company, Inc. v. Harbin*, 126 Ga. App. 72, 73 (190 SE2d 91); *Allied Van Lines, Inc. v. Hanson*, 131 Ga. App. 506 (2) (206 SE2d 108). Here the carrier had inserted the following information on the bill of lading, "Subject to Section 7 of Conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." This statement was not signed, although the goods were shipped collect. Section 7 of the contract terms and conditions had reference to the fact that the owner or consignee shall pay the freight except in certain instances. But under the authority of *Aero Mayflower Transit Company, Inc. v. Harbin*, 126 Ga. App. 72, supra, and *Allied Van Lines, Inc. v. Hanson*, 131 Ga. App. 506, supra, the trial court held that the plaintiff failed to bill the defendant

shipper within seven days of delivery as required by 49 CFR §1322, but instead had waited seven months to do so. Hence, the plaintiff had extended credit to the consignee for a period longer than that authorized by the ICC regulations. This case is controlled by the two cases cited. The trial court did not err in rendering judgment for the defendant against the plaintiff.

2. Having properly granted the motion for directed verdict (considered by judge without a jury), it was not necessary to render separate findings of fact and conclusions of law, although the judgment contained both.

Judgment affirmed. Bell, C.J., and Smith, J., concur.

III. ORDER OF THE COURT OF APPEALS OF GEORGIA ON MOTION FOR REHEARING

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, December 7, 1977

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

54694. Brown Transportation Corp. etc. v. Atcon, Inc.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

IV. ORDER OF THE SUPREME COURT OF GEORGIA ON APPLICATION FOR WRIT OF CERTIORARI

33330

SUPREME COURT OF GEORGIA

ATLANTA, January 25, 1978

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Brown Transportation Corporation, etc. v. Atcon, Inc.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

V. ORDER OF THE SUPREME COURT OF GEORGIA ON MOTION FOR RECONSIDERATION

33330

SUPREME COURT OF GEORGIA

ATLANTA, February 8, 1978

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Brown Transportation Corporation, etc. v. Atcon, Inc.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

APPENDIX B: STATUTES AND REGULATIONS INVOLVED

The applicable provisions of Part II of the Interstate Commerce Act, 49 U.S.C. §301 et. seq., are reprinted below in pertinent part:

> 49 U.S.C. §317 (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate of foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.
>
> (b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for

transportation in interstate or foreign commerce except such as are specified in its tariffs: Provided, That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

49 U.S.C. §323 No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in interstate or foreign commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice:

The applicable Regulations of the Interstate Commerce Commission are reprinted below in pertinent part:

49 C.F.R. §1322.1 Carrier may extend credit to shipper.

(a) Extension of credit. Upon taking precautions deemed by them to be sufficient to assure payment of the tariff charges within the credit period herein specified, common carriers by motor vehicle may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay them, such persons herein being called shippers, for a period of 7 days excluding Saturdays, Sundays, and legal holidays. When the freight bill covering a shipment is presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following delivery of the freight. When the freight bill is not presented to the shipper on or before the date of delivery, the credit period shall run from the first 12 o'clock midnight following the presentation

of the freight bill. In regard to traffic of non-profit shippers' associations and shippers' agents, within the meaning of section 402(c) of part IV of the Interstate Commerce Act, the carriers shall require such organizations to furnish the names of the beneficial owners of the property in the bills of lading or at least have the bills of lading incorporate by reference a document containing the names of the beneficial owners.

49 C.F.R. §1322.3 Period of credit following delivery of freight.

Freight bills for all transportation charges shall be presented to the shippers within 7 calendar days from the first 12 o'clock midnight following delivery of the freight except that motor common carriers of household goods and motor common carriers of oilfield equipment shall present their freight bills for all transportation charges to the shipper within 15 calendar days, excluding Saturdays, Sundays, and holidays, from the first 12 o'clock midnight following delivery of the freight.

[38 FR 18253, July 9, 1973]

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1581

BROWN TRANSPORT CORP.,
Petitioner,

vs.

ATCON, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

QUESTIONS PRESENTED

(1) Whether a state court can protect litigants involved in interstate commerce from harm, under established equity principles, when this protection does not violate the language or purpose of the Interstate Commerce Act.

(2) Whether the Interstate Commerce Act can be employed by Petitioner-Carrier to shift losses caused by its own improper practices onto Respondent-Shipper.

STATEMENT OF CASE

Briefly stated, this case arises from a long series of mistakes and oversights by both parties. In October of 1974, BROWN TRANSPORT CORP. (hereinafter "Petitioner-Carrier") received goods from ATCON, INC. (hereinafter "Respondent-Shipper") for delivery under "collect" bills of lading to Idaho Shippers Association (hereinafter "consignee") (Tr. 1, 5).

The initial oversight occurred when Respondent-Shipper failed to sign Section 7 of the Uniform Bills of Lading, thereby undertaking to pay freight charges even though goods were being shipped on a collect basis (Tr. 6). Next, Petitioner-Carrier delivered the goods to consignee on open account without first conducting a credit investigation on consignee as required by 49 CFR §1322.1 (R. 41, Tr. 6). Petitioner-Carrier then sent freight bills for the transportation charges to consignee (Tr. 6), rather than to Respondent-Shipper as required by 49 CFR §1322.1 (Tr. 6). Petitioner-Carrier realized there was a serious collection problem in March of 1975, some five months after delivery (Tr. 7), but continued its efforts to collect from consignee for another two months, at one point agreeing to payment of the freight charges over a twenty-four month period (Tr. 7). *Seven months after delivery*, Petitioner-Carrier was notified that consignee planned to file a bankruptcy petition (Tr. 7), and only then sent the first freight bill to Respondent-Shipper (Tr. 10).

Thereafter, Petitioner-Carrier filed suit against Respondent-Shipper in the Civil Court of Fulton County, Georgia (R. 3, 4). Respondent-Shipper answered, denying any indebtedness was due, and in addition pleading the affirmative defenses of estoppel, fraud, laches and waiver (R. 41). At the hearing, Respondent-Shipper made an oral motion for directed verdict based on Petitioner-Carrier's lax billing practices and upon Georgia case law (Tr. 10, 11). This motion was granted by the Court (Tr. 19).

ARGUMENT

I.

A STATE COURT CAN PROTECT LITIGANTS INVOLVED IN INTERSTATE COMMERCE FROM HARM, UNDER ESTABLISHED EQUITY PRINCIPLES, WHEN THIS PROTECTION DOES NOT VIOLATE THE LANGUAGE OR PURPOSE OF THE INTERSTATE COMMERCE ACT.

Petitioner-Carrier strenuously argues that Section 217 of the Interstate Commerce Act, 49 USC §317, imposes absolute liability upon Respondent-Shipper for the freight charges at issue, and claims that the principle of equitable estoppel cannot therefore be applied to defeat the claim. However, Section 217 simply forbids carriers from charging, demanding, collecting or receiving greater or less or different compensation than that specified in the tariffs. The purpose of this section is to prevent rate discrimination by compelling carriers to exact identical charges for identical services. See, e.g., *I.C.C. vs. North Pier Terminal Co.*, 164 F.2d 670 (7th Cir. 1948), *cert. denied*, 334 U.S. 815 (1948). Discrimination is involved when the question is the *amount* of the freight charge. Discrimination is not involved when the question is whether a particular party is responsible for the freight charge. For this reason, the Act does not purport to determine which party to a freight transaction shall be responsible for freight charges. *Louisville and Nashville Railroad Co. vs. Central Iron and Coal Company*, 265 U.S. 59, 44 S. Ct. 441, 68 L. Ed. 900 (1924). Nor does the Act withhold the protections afforded by equity from freight charge litigants. See, e.g., *Consolidated Freightways Corp. vs. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971).

In *Consolidated*, as in the present suit, the carrier had made unlawful credit extensions on freight charges while indicating by its silence that these charges had been paid. Since the carrier's silence had effectively prevented the defendant from protecting its position, and since the carrier had contributed substantially to its own loss by its unlawful and lax credit extensions, the Court held the carrier estopped to collect the freight charges from defendant. This was not the first time a carrier had been estopped from collecting freight charges against a defendant who had been misled into thinking it would not have to pay these charges. See, e.g., *Cincinnati Northern R. Co. vs. Beveridge*, 8 F.2d 372 (E.D. Va. 1925); accord, *Davis vs. Akron Feed and Milling*, 296 F. 675 (6th Cir. 1924).

For other cases in which a carrier has been held estopped from collecting freight charges, see *Southern Pacific Transportation Co. vs. Campbell Soup*, 455 F.2d 1219 (8th Cir. 1972); *Missouri Pacific R. R. vs. National Milling Co.*, 276 F. Supp. 367 (D.N.J.1967), *aff'd*, 409 F.2d 882 (3rd Cir. 1969); *Farrell Lines vs. Titan Industrial Corp.*, 306 F. Supp. 1348 (S.D.N.Y. 1969), *aff'd*, 419 F.2d 835 (2nd Cir. 1969), *cert. denied*, 397 US 1042 (1970). The case law in other states likewise favors the decision of the trial court in the instant case. See e.g., *Interstate Motor Freight System vs. Wright Brokerage Co.*, 539 S.W. 2d 764 (Mo. Ct. App. 1976); *Union Pacific Railroad v. Stadelman Fruit, Inc.*, 13 Wash. App. 824, 537 P. 2d 1076 (1975); *Lyon Van Lines, Inc. v. Cole*, 9 Wash. App. 382, 512 P. 2d 1108 (1973); *Tom Hicks Transfer Co. v. Ford, Bacon & Davis Texas, Inc.*, 482 S.W. 2d 364 (Tex. Civ. App. 1972).

In the present suit, Petitioner-Carrier made unlawful credit extensions when it delivered goods on open account without first taking precautions to assure that consignee would later pay the freight charges. By failing to send a freight bill to Respondent-Shipper for seven months, Petitioner-Carrier misled Respondent-Shipper into thinking the freight charges had been paid. When Respondent-Shipper finally did receive a freight bill, it was too late to pay the charges and then obtain reimbursement from the consignee because by this time the consignee was ready to declare bankruptcy. The Georgia court therefore properly held Petitioner-Carrier estopped from collecting the freight charges at issue from Respondent-Shipper.

II.

THE INTERSTATE COMMERCE ACT CANNOT BE EMPLOYED BY PETITIONER-CARRIER TO SHIFT LOSSES CAUSED BY ITS OWN IMPROPER PRACTICES ONTO RESPONDENT-SHIPPER.

Section 223 of the Interstate Commerce Act, 41 USC §323, prohibits a carrier from delivering freight before freight charges are paid unless the carrier complies with certain Interstate Commerce Commission Regulations governing credit extensions. Pursuant to these regulations, a carrier may not relinquish goods before payment of freight charges unless it has first taken precautions deemed sufficient to assure payment of these charges, 49 CFR §1322.1. Also, a carrier which delivers goods without receiving payment of freight charges is required to present a bill for the charges to the "shipper" within seven days following delivery, 49 CFR §1322.3. A "shipper" is defined in 49 CFR §1322.1 as the person who "undertakes to pay" the tariff charges.

In the present suit, Petitioner-Carrier first failed to make the required credit investigation of consignee, and next failed to bill Respondent-Shipper for seven months. Respondent-Shipper should have been billed within the prescribed seven days because it was the "shipper" for the purposes of the quoted regulation. This is true because Respondent-Shipper undertook to pay the freight charges when it failed to sign Section 7 of the bills of lading. Also, Respondent-Shipper was designated in all the bills of lading as "shipper" in the transaction (Tr. 21, 26, 27). Petitioner-Carrier should not now be allowed to employ the very Act which it violated to shift the losses caused by its violations onto Respondent-Shipper. As stated in *Consolidated*, *supra* at 62, "Congress did not intend [by passing Section 223] to fashion a sword to assure collection in every instance and a shield to insulate the carrier from the legal consequences of otherwise negligent or inequitable conduct."

CONCLUSION

For the reason set forth above, the Petition for Certiorari should be denied.

AFFIDAVIT OF SERVICE

STATE OF GEORGIA

COUNTY OF FULTON

D. Lake Rumsey, Jr., being first duly sworn, deposes and says that on the 24th day of July 1978, he served three copies of the foregoing Brief on BROWN TRANSPORT CORP., by depositing the same in the United States Mail, with first class postage prepaid, addressed to counsel of record at their post office address, to wit: Harry W. Bassler, Esq., H. Lowell Hopkins, Esq., Patrick J. McKenna, Esq., Suite 3625, 101 Marietta Tower, Atlanta, Georgia 30303.

D. Lake Rumsey, Jr.

Sworn to and subscribed
before me this 24th day
of July, 1978.

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 2, 1980